Citation Patterns of the German Federal Supreme Court and the Court of Appeal of England and Wales

Mathias M Siems

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Abstract: This paper presents citation statistics on decisions of the Court of Appeal of England and Wales (CA) and the German Federal Supreme Court (*Bundesgerichtshof,* BGH) for the last 55 years. This data is used in order to identify whether the citation patterns of the CA and the BGH reflect the conventional comparative perceptions about the English and German legal system. For instance, it is addressed how often the CA and the BGH cite the highest national and European courts and higher foreign courts from different legal families. The paper also examines the cross-citations between the highest courts of the United Kingdom (House of Lords, Court of Appeal of England and Wales, Court of Appeal in Northern Ireland, Court of Session and the High Court of Justiciary).

Keywords: Court of Appeal of England and Wales, German Federal Supreme Court, Bundesgerichtshof, citation patterns, foreign case law, constitutionalization, Europeanization, numerical comparative law.

JEL Classification: C00, H73, K10, K40

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INTRODUCTION

The rise of empirical legal studies has been accompanied with a growing interest in the use of quantitative methods in law.[1] This 'quantitative turn' has not been without problems. On a methodological level, quantitative methods may be criticised as superficially reducing the complexity of the legal system.[2] Practically, it may be a hurdle that legal academics often lack statistical training. Moreover, there is the problem of data availability. For instance, getting real world data on law enforcement requires considerable efforts, and methods that code legal rules may only provide a very limited picture of the legal system.[3]

The present article employs a further way how data can be collected. It presents citations statistics on decisions of the Court of Appeal of England and Wales (CA) and

* Professor of Law, Norwich Law School University of East Anglia and Research Associate, Centre for Business Research, University of Cambridge. I am grateful to Martin Gelter, Daithí Mac Sithigh, Rosemary Pattenden, Deborah Russel, Burkhard Schäfer, Duncan Sheehan, Christine Shepherd, and the participants of the Norwich Law School Research Seminar Series for helpful discussions. The usual disclaimer applies.

[1] See eg the *Journal on Empirical Legal Studies* (since 2004), the SSRN Series on Experimental & Empirical Studies (available at http://www.ssrn.com/update/lsn/lsn_empirical-law.html); the Empirical Legal Studies Blog (http://www.elsblog.org/).

[2] See Mathias M Siems, 'Numerical Comparative Law: Do We Need Statistical Evidence in Order to Reduce Complexity?' (2005) 13 *Cardozo Journal of International and Comparative Law* 521.

[3] See Priya Lele and Mathias M Siems, 'Shareholder Protection – A Leximetric Approach' (2007) 7 *Journal of Corporate Legal Studies* 17.

the German Federal Supreme Court (*Bundesgerichtshof,* BGH) for the last 56 years, examining more than 35,000 decisions. This data is used in order to identify whether the citation patterns of the CA and the BGH reflect the common perceptions about differences between English and German law. For instance, traditionally, one would argue that case law only matters in the English legal system, because in Germany judges are only interpreters of the law. Usually it is also emphasised that the binding force of precedent (*stare decisis*) of the Common Law has no equivalent in Germany where decisions are only binding to the parties of a trial.[4] Conversely, the modern counterview argues that in actual practice there is as much judge-made law in continental Europe as in England, and a judgment of the BGH 'can count on being followed by lower courts as much as a judgment of an appeal court in England'.[5]

The structure of the article is as follows: The first part explains its methodology. The following three parts present the main results on CA and BGH citations to the highest national and European courts, to higher foreign courts and citations of own decisions. The next part addresses the relationship between the Court of Appeal of England and Wales, the highest Scottish and Northern Irish courts and the House of Lords. The final part concludes.

[4] Peter de Cruz, *Comparative Law in a Changing World* (London: Cavendish, 3nd edn, 2007) 252, 262 (but see also 253).

[5] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon, 3rd edn, 1998) 70, 71, 262.

METHODOLOGICAL QUESTIONS

Which courts?

This article is interested in the main court of last resort in matters of civil and criminal law in Germany and England and Wales. This court is easy to identify in Germany: the German Federal Supreme Court (BGH) is the highest court in matters of private and criminal law, which also includes civil and criminal procedure.[6] Only when constitutional issues arise within a particular case decided by the BGH, a further constitutional complaint to the German Federal Constitutional Court (BVerfG) may lead to the BVerfG repealing a decision made by the BGH.

The closest equivalent to the BGH is the Court of Appeal of England and Wales (CA). The CA is responsible for appeals in civil and criminal matters. Although these matters may then be appealed to the Supreme Court of the United Kingdom (previously: the Appellate Committee of the House of Lords), this does not make the Supreme Court to the *main* court of last resort in matters of civil and criminal law. Only in rare cases will the UK Supreme Court decide about these issues. Thus, it is more appropriate to equate it with the BVerfG than with the BGH. This can also be illustrated by the number of judges and decisions of these two types of courts: the BVerfG and the UK Supreme Court have a small number of judges (16 and 12) and they may deliver less than

[6] There are four other supreme federal courts: The Federal Administrative Court (*BVerwG*), the Federal Finance Court (*BFH*), the Federal Labour Court (*BAG*), and the Federal Social Court (*BSG*). See Art 95 of the German Basic Law (Grundgesetz). The Federal Constitutional Court (*BVerfG*) and the Federal Patent Court (*BPatG*), while also federal courts, do not act as supreme courts for any branch of jurisdiction.

100 judgements per year,[7] whereas the BGH and the CA have more than 40 judges,[8] deciding about 3000 cases per year.[9]

Still, the interpretation of the following results has to take into account the differences between BGH and CA.[10] First, the jurisdiction of the CA is more extensive than the one of the BGH since it not only covers civil and criminal law but also, say, labour and administrative law. Secondly, the UK Supreme Court can repeal decisions of the CA to a wider extent than the BVerfG can repeal decisions of the BGH. Thirdly, the CA of England and Wales has no jurisdiction over Scottish and Northern Irish cases, as appeals to these cases go to the Court of Session (for Scottish civil cases), the High Court of Justiciary (for Scottish Criminal Cases) and the Court of Appeal in Northern Ireland.

Which databases?

Only the post-2000 decisions of the BGH and the CA are electronically available in the entirety.[11] Since the present article is interested in tracing the development over a longer time-period, I had to use databases which only report a selection of case. This is a limitation of the current article. However, it does not invalidate its results since, in statistical terms, it can be said that the population of this study are the most important cases of the BGH and the CA, as reported in these databases.

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[7] See http://www.bailii.org/uk/cases/UKHL/2007/ and http://www.bundesverfassungsgericht.de/entscheidungen.html.

[8] See http://www.hmcourts-service.gov.uk/cms/1287.htm (44 judges) and http://www.bundesgerichtshof.de/bgh/richter.php (circa 100 judges).

[9] Between 2000 and 2007 the BGH decided 22,950 cases and the CA decided 25,855 cases. Search in http://www.beck-online.de (all decisions) and http://www.westlaw.co.uk (Law Reports and Official Transcripts).

[10] See text to notes 23-32 and 76-85 below.

[11] See note 9 above.

With respect to Germany, I have considered all decisions of the BGH which have been published in the law journal *Neue Juristische Wochenschrift* (NJW) between 1951 and 2007.[12] In total, this concerns 28,063 decisions. As the number of reported decisions varies between 360 (in 1968) and 633 (in 1982) per year, the following will not report the absolute numbers per year but the hits per hundred decisions.

It was a difficult task to decide which database should be used for the decisions of the CA. Given the fact that the population of England and Wales is between 25 per cent (after 1990) and 10 per cent (before 1990) less than the population of Germany, it would have been ideal to use a database with the most important 300 to 550 CA decisions per year. Unfortunately, such a database is not available. The two sources which are closest to it are the Weekly Law Reports (WLR) and the All England Law Reports (All ER), which report between 100 and 150 cases per year.[13] Although this is three times less than the ideal number of cases, the results are unlikely to be affected. Table 1 presents the CA decisions found in Westlaw and in WLR for 1977. This year was chosen because the total number of Westlaw decisions is 341, which is equivalent to the number of BGH decisions published in the NJW in 1977 (389 minus 10 per cent). Comparing the percentage figures for all Westlaw and WLR decisions, it can be seen that the results are very similar.[14] This suggests that WLR (or All ER) can be used for a comparison with the BGH decisions published in the NJW.

[12] Available at http://www.beck-online.de (but password required).

[13] In total there have been 7,744 decisions published in All ER between 1951 and 2007, and 7,832 decisions published in WLR between 1953 and 2007.

[14] Equivalent calculations have been performed for 1976 and 1978. They confirm this result: 18 and 24 per cent (1976), and 17 and 26 per cent (1978) of the decisions cite the HL, and 31 and 45 (1976), and 26 and 25 per cent (1978) of the decisions cite the CA.

Table 1: Comparison between different databases for 1977

	Total decisions		Percentage of total decisions	
	Westlaw total	WLR (via Westlaw)	Westlaw total	WLR (via Westlaw)
Court of Appeal decisions	341	163	100.0	100.0
CA: significant citations of House of Lords (HL) cases	74	36	21.7	22.1
CA: significant citations of Court of Appeal cases	128	57	37.5	35.0

The full text of all All ER decisions can be searched via Lexis Nexis and the full text of all WLR decisions can be searched via Westlaw. In many respects, these two databases provide similar features, but they are not identical. In both databases is it possible to search the full text of all decisions. In addition, with Westlaw one can limit the search to 'significant cases cited'. The problem is that the restriction to 'significant' cases often excludes more than half of the cases which are actually cited in a particular decision. Thus, this search would considerably understate the number of hits.

The reverse problem occurs if one searches the full text of all WLR decisions. Westlaw not only searches the decisions themselves, but also the 'case analysis', which includes references to other decisions and journal articles citing this case. For an everyday user of Westlaw this is very valuable, but it would seriously spoil citation hits. Thus, searching the full text of WLR cannot be used for the present purposes, because it would considerably overstate the number of hits.

Fortunately, this is different for a full text search of All ER via Lexis Nexis. However two problems also arise here. First, it spoils the results with 30 per cent of the decisions a list of 'cases referred to in argument'[15] (but not referred to in judgement), being included in the search results. This can be addressed by a 'spoiler discount'. Samples

[15] Sometimes this is also called 'cases also cited', 'cases referred to in skeleton argument' or 'cases referred to in list of authorities'.

show that these decisions overstate the number of citations to the House of Lords by 15 per cent and to other courts by 35 per cent. Therefore, it is possible to use a formula that takes into account how many decisions of a particular year have a list of 'cases referred to in argument' and how much this fact influences the number of citations.[16]

Secondly, searching the full text only works if the search item leads to hits for all citations wanted, but not more. This is a problem for the question of how often Court of Appeal cases have been cited, since until 2001 these cases have been reported in different reports, and frequently the letters 'CA' have not been added. With respect to other citations, search items such as 'AC' (for House of Lords), 'ECR' (for European Court of Justice), 'ECHR' (for European Court of Human Rights) and 'US SC '(for US Supreme Court) work well. In the interpretation of these results, some minor 'spoilers' have to be identified. For instance, 'AC' may also refer to decisions of the Privy Council, and 'ECR' can also include citations of the Court of First Instance.

Consequently, most parts of this article are based on the full text search of All ER. In particular, this concerns the citations of the CA to the House of Lords, the European courts and higher foreign courts.[17] A different approach is followed for the CA citations of its own decisions. Here one can only use the 'significant cases cited' function of the cases published in WLR. Although this understates the number of hits, these results can still be employed in order to identify the relative number of citations over time.[18]

[16] The formula is: 'hits' minus (Hits * per cent of 'spoilers' for this year * 0.15 (or 0.35)).

[17] See text to notes 23-71 below.

[18] See text to notes 72-75 below.

General caveats

Quantitative methods can involve complex statistical and econometric techniques, but mere counts can also be interesting. This article uses simple techniques, mainly limited to citation counts. Against this approach, one may object that the number of citations to other decisions does not reveal the context in which these citations are used. This particularly includes whether a court approved, disapproved or distinguished these decisions.

However, this would not be a fair criticism. First, some reduction of complexity is inherent to all quantitative methodologies, without implying that it is not feasible to pursue them.[19] Secondly and more specifically, the number of citations is interesting because it indicates the degree to which previous decisions have *potentially* influenced a court. Thirdly, empirical results always have to be interpreted. Thus, the following sections will not only present the results, but also offer suggestions as to what may or may not be concluded from this data.

The present analysis is limited to citation patterns. It does not undertake a general examination of judicial style in England and Germany. For instance, it is often said that in Common Law countries, judges speak as individuals, often in an informal manner. In contrast, Germany's decisions are usually delivered collectively, in a very structured and occasionally academic way.[20] It would be difficult, but not impossible to use certain

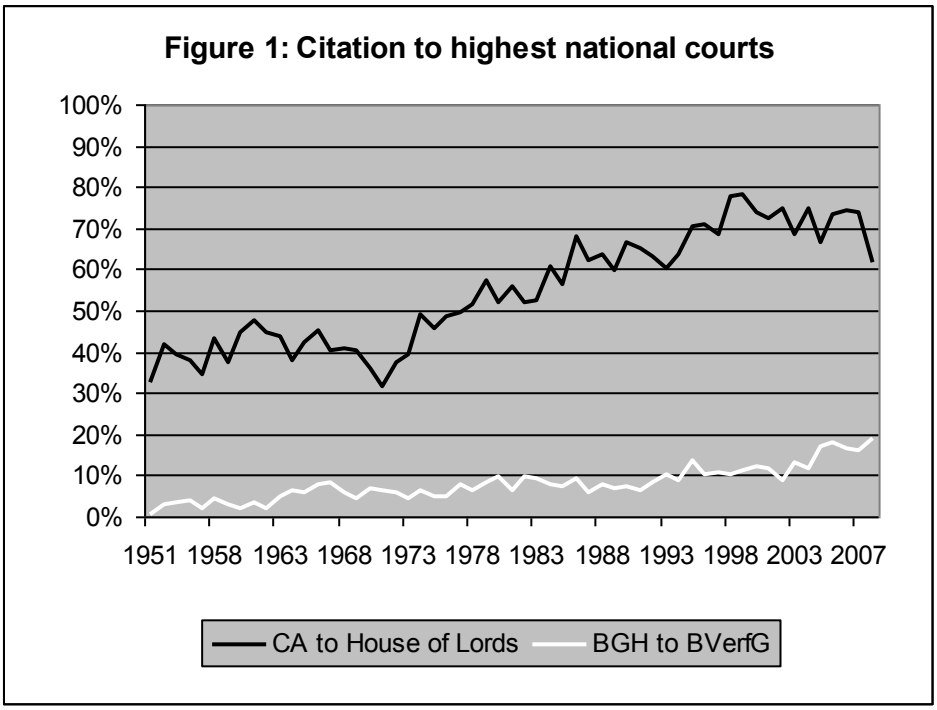
[19] For previous examples see Robert C Ellickson, 'Trends in Legal Scholarship: A Statistical Study' (2000) 29 *Journal of Legal Studies* 517; Richard A Posner, *Frontiers of Legal Theory* (Cambridge, Mass: Harvard University Press 2001) 411-440; Alfred Brophy, 'Law [Review]'s Empire: The Assessment of Law Reviews and Trends in Legal Scholarship' (2006) 39 *Connecticut Law Review* 101; Roland Wagner-Döbler and Lothar Philipps, 'Die Verbreitung neuer Rechtsbegriffe in der Rechtsprechung. Quantitative Analysen anhand deutscher Urteilstexte aus den Jahren 1950 bis 1992' (1995) 26 *Rechtstheorie* 235.

[20] See eg Sir Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany'

search items in order to identify the legal style and methodology of court decisions in different countries. This will not be undertaken here.[21] However, it will be shown that, in average, CA and BGH cite a similar number of cases per decision.[22]

CITATIONS TO HIGHEST NATIONAL AND EUROPEAN COURTS

Figure 1 displays how often the BGH has cited decisions of the German Federal Constitutional Court (BVerfG),[23] and how often the CA has cited decisions of the House of Lords (and the Privy Council).[24]



(2000) 59 *Cambridge Law Journal* 294; Sir Basil Markesinis, 'A matter of style' (1994) 110 *Law Quarterly Review* 607.

[21] For Germany see Mathias Siems, 'The Adjudication of the German Federal Supreme Court (BGH) in the Last 55 Years – A Quantitative and Comparative Approach', (2007) *Oxford University Comparative Law Forum* No 4.

[22] See text to notes 38-40 below

[23] Search for 'Bundesverfassungsgericht' or 'BVerfG'.

[24] Search for 'AC' (decisions since 1891) or 'UKHL' (decisions since 2001).

It can be observed that citations of the BGH to the German Federal Constitutional Court have constantly increased from zero to 20 per cent. The first and obvious reason is that the German Federal Constitutional Court was only established in 1949, and therefore there was little case law which could have been cited by the BGH in the 1950s. Moreover, there is a growing 'constitutionalisation' of private and criminal law. For instance, in private law, human rights have often been used in order to protect the weaker party of a contract.[25] With respect to criminal law, it matters that some principles enjoy constitutional status, such as that there must not be a crime or punishment without the law.[26] Procedural law also has a constitutional dimension. The German constitution contains at least three provisions which require fairness in court proceedings.[27] Thus, the German Federal Constitutional Court adjudicates on procedural questions, which subsequently makes the BGH cite the German Federal Constitutional Court.

The citations of the CA to the House of Lords are also rising, from 30-50 per cent in the 1950s and 60s to 60-80 per cent since the mid 80s. Here it could be assumed that as the number of House of Lords decisions is growing, citations become more frequent. However, a better explanation is that this trend is part of a more general phenomenon, namely that the use of databases makes it easier to access case law. This substantial growth in the number of readily available reports of judgments is also noted by the Lord Chief Justice in his Practice Direction on the Citation of Authorities.[28] Furthermore, in

[25] Eg, in cases of spousal guarantees. See Mathias M Siems, 'No Risk, No Fun? Should Spouses be Advised before Committing to Guarantees? A Comparative Analysis', (2002) 10 *European Review of Private Law* 509; Olha Cherednychenko, 'The Constitutionalization of Contract Law: Something New Under the Sun?', *Electronic Journal of Comparative Law*, Vol 8.1 March 2004, available at http://www.ejcl.org/81/art81-3.html (last visited 16 September 2009).

[26] See Art 103(2) of the German Basic Law (Grundgesetz).

[27] See Arts 19(4), 20(3), 103(1) German Basic Law (Grundgesetz).

[28] The Lord Chief Justice of England and Wales, Practice Direction on the Citation of Authorities, 2001, available at http://www.hmcourts-service.gov.uk/cms/814.htm (last visited 16 Sep-

Michaels v. Taylor Woodrow Developments Ltd,[29] Laddie J even criticised the over-citation of authority. A possible counterforce is that the case-based common law is becoming more and more substituted by statutory law. It has been said that 'the idea that enactments are simply islets in an ocean of case-law is no more than a nostalgic anachronism even in England, let alone in the United States'.[30] This explains the slight decline in citations since 1999.

From comparing Germany and England, it is apparent that the House of Lords is cited more frequently than the BVerfG.[31] The natural reason is that the jurisdiction of the House of Lords is wider, because the BVerfG only deals with constitutional complaints. Thus, looking for an analogy to citations to the BVerfG, it can be counted how often the CA has cited the European Court of Human Rights (ECHR). One would expect that since the Human Rights Act 1998 (in force since 2000) the number of citations has grown substantially.

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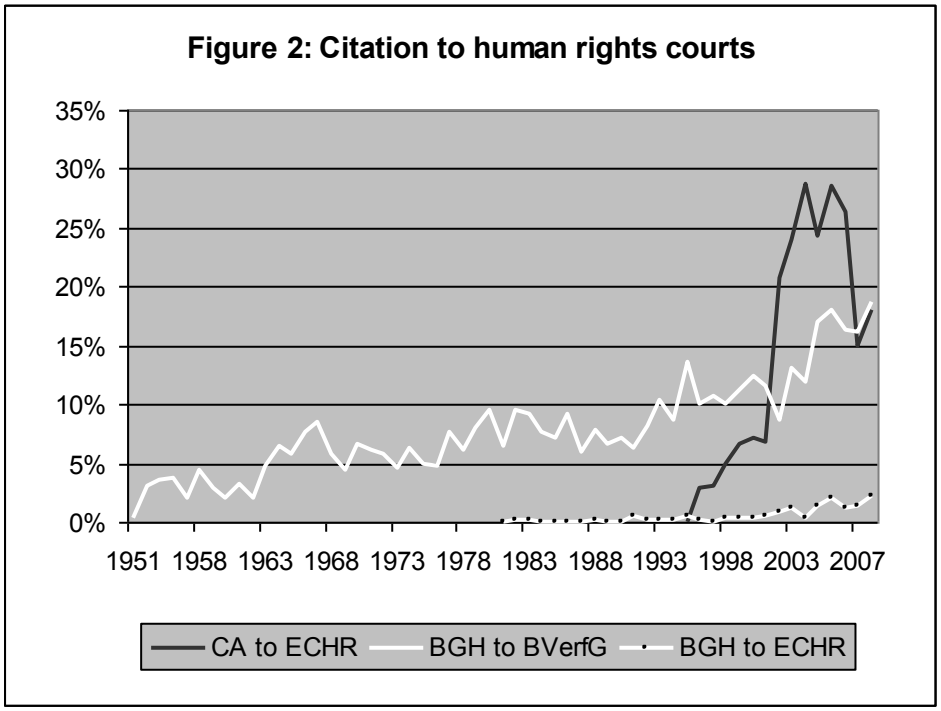
tember 2009) at 1. ('[...] the current weight of available material causes problems both for advocates and for courts in properly limiting the nature and amount of material that is used in the preparation and argument of subsequent cases').

[29] *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, [2001] 2 WLR 224 per Laddie J at para 78 (in particular regarding unreported decisions). See also Roderick Munday, 'Over-Citation: Stemming the Tide' (2002) 166 *Justice of the Peace* 6, 29 and 83.

[30] Zweigert and Kötz (n 5) 70.

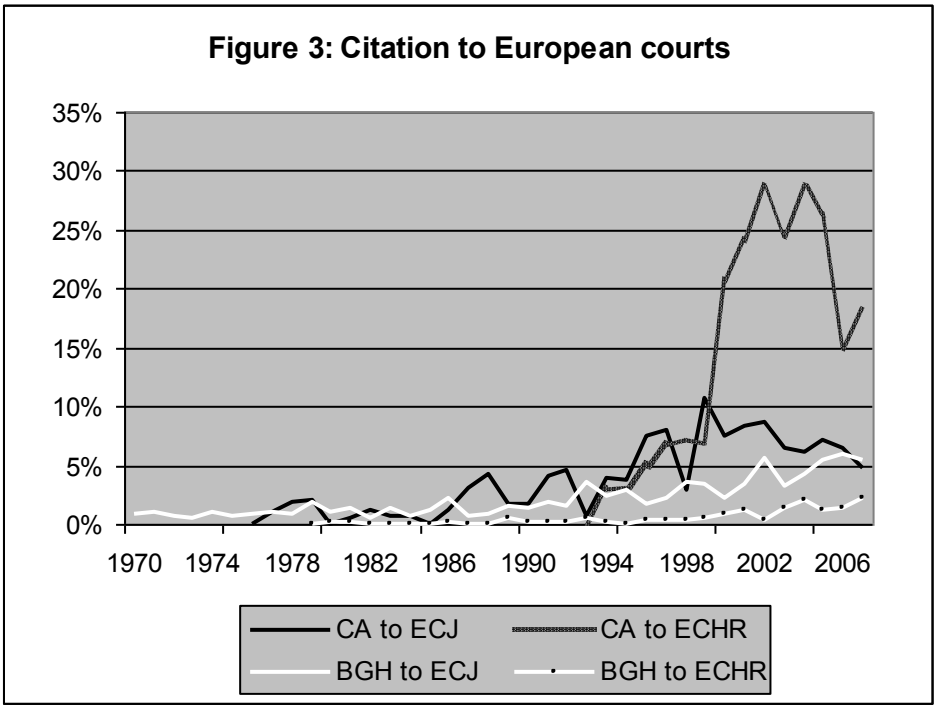
[31] On average the BVerfG has been cited in 7.90 per cent of the BGH decisions (standard deviation 4.14) and the House of Lords has been cited in 54.75 per cent of the CA decisions (standard deviation 13.79).



In the years 2000 to 2005, more than 20 per cent of the decisions of the CA cited the ECHR. In the last two years the percentage has fallen to just above 15 per cent. A first explanation is that in the first years of the Human Rights Act the CA could almost exclusively rely on the case law of the ECHR. However, now it can also use precedents from UK courts. Secondly, there may have been some reporting bias in the All ER, since in the first years of the Human Rights Act British lawyers were extremely keen on following all decisions which directly or indirectly concerned this Act.

Since Germany has a specialised constitutional court, the ECHR plays a much smaller role.[32] Still, there is a rise in BGH decisions citing the ECHR. This leads to the general question of whether decisions of the two main European courts (ECHR and ECJ) are becoming more influential in Germany and England.

[32] Since 1994 (the first year the ECHR was cited in the UK), on average, the ECHR has been cited in 0.9 per cent of the BGH decisions (standard deviation 0.70) and in 15.49 per cent of the CA decisions (standard deviation 9.97). The value of the test statistic is 15.5, which means that at a 99.99 per cent level we can reject the hypothesis that the frequency of citations to the ECHR is equal.



In Germany there is a constant upward trend of the BGH citations to both European courts.[33] On the one hand, this derives from the fact that previously there were none, or fewer decisions which could have been cited. On the other hand, with respect to the European Court of Justice (ECJ), the increase is a result of the growing quantity of European directives and regulations, as well as the expansion of the European Treaty in 1987, 1993 and 1999.[34] In the UK the trend is less clear. Although generally, the number of citations has also been growing, this seems to have reversed in the last few years. Some reasons for the drop of ECHR citations have already been suggested. With respect to the ECJ[35] one should also not overemphasise the changes since the number of cita-

[33] Search for 'Europäischer Gerichtshof' or 'EuGH'.

[34] Single European Act 1976; Treaty of Maastricht 1993; Treaty of Amsterdam 1999.

[35] Search for 'ECR' or 'ECJ'. For the 'Court of First Instance spoiler' see text to notes 9-11 above.

tions is relatively small. Indeed, if one considers all decisions of the CA between 2000 and 2007, we do not observe a falling trend.[36]

By comparing the German and English system, it may be a surprise that the ECJ is cited more often by the CA than by the BGH.[37] Does this mean that English judges are more pro-European than German judges? Or, conversely, could it be the case that violations of European law have led to more citations in England than in Germany?

A tempting reply may be that it is just natural that in a Common Law country like England case law is cited more often than in a Civil Law country like Germany.[38] However, a random sample of 57 decisions per country (one per year) does not confirm this fact:[39] the sample mean of all citations per decision is 7.26 for the CA and 7.96 for the BGH. Thus, at least in this sample, there are even more citations per decision in Germany than in England. Since the variations are very high,[40] one can also not reject the hypothesis that the population means are equal.

A better explanation is that the differences in jurisdiction have an impact on the number of citations to the ECJ. Both CA and BGH decide about contract, tort and property law, as well as criminal cases. However, these areas of law are only sparsely harmonised by the European Union. Thus, it matters that the CA, but not the BGH, is also

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[36] Full text search via Westlaw. The number of citations are 13, 21, 16, 21, 30, 21, 35, and 31.

[37] Since 1977 (the first year the ECJ was cited in the UK), on average, the ECJ has been cited in 2.41 per cent of the BGH decisions (standard deviation 1.60) and in 3.91 per cent of the CA decisions (standard deviation 3.02). The value of the test statistic is 2.01, which means that at a 90 per cent level we can reject the hypothesis that the frequency of citations to the ECJ is equal.

[38] Conversely, it is usually said that in Germany the academic literature is cited more frequently than in England. See Hein Kötz, 'Scholarship and the Courts: a Comparative Survey' in *Comparative and Private International Law: Essay in Honour of J.H. Merryman on his Seventieth Birthday* (ed David S Clark 1990) 183-195.

[39] In order to achieve a random sample the first decision of the CA and of the BGH published on or after the 25th of June of each year were examined.

[40] The standard deviations are 6.00 for the CA and 6.84 for the BGH. The value of the test statistic is 0.58.

competent for topics which have been harmonised to a larger extent, such as employment and tax law. In order to confirm this point, it has been checked for which topics the CA has cited the ECJ in its peak year 1999 – with the result that half of these citations refer to topics for which the BGH would not have been competent.[41]

CITATIONS TO FOREIGN HIGHER COURTS

Foreign courts may be cited because of two reasons. On the one hand, cases may need to refer to foreign decisions in questions relating to the application of that foreign law, or of private international law, jurisdiction, and uniform international law.[42] On the other hand, foreign jurisprudence may be used in order to address a problem of domestic substantive law, because insights gained from a comparative legal analysis may be brought in as a cognitive approach in interpreting of domestic law.[43]

One may expect that courts are more likely to cite cases from a country which belongs to the same legal family, and in which the same language is spoken. Figure 4 presents how often foreign higher courts from English/German-speaking and from other countries have been cited between 1984 and 2007.[44] Since not all countries of the world

[41] The 14 citations to the ECJ in 1999 concern the following areas of law: employment law (3), tax and social security law (2), (other) administrative law (2), conflict of laws and jurisdiction (3), company law (1), contract law (1), unfair competition (1), IP law (1). The first three areas of law would not be decided by the BGH.

[42] See Esin Örücü, 'Comparative Law in Practice: The Courts and the Legislator' in *Comparative Law: A Handbook* (Esin Örücü and David Nelken eds; Oxford: Hart Publishing, 2007) 411, 418-425.

[43] For the UK see *Fairchaild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 (supportive role of comparative law). For Germany see Hein Kötz, Der Bundesgerichtshof und die Rechtsvergleichung, *Festgabe 50 Jahre Bundesgerichtshof, Volume II* (2000), 825.

[44] This shorter time-series than in the previous part had to be used because All ER only provides reliable abbreviated citations to foreign higher courts since 1984.

could be covered, the following have been selected. With respect to the English-speaking countries cited by the CA, the federal courts of Australia, Canada and the US, the highest courts of New Zealand, Ireland and South Africa, and the highest courts of the two most populated Australian states (New South Wales and Victoria), and the two most populated English-speaking Canadian provinces (Ontario and British Columbia) have been taken into account.[45] The category 'CA to other courts' focuses on the highest German and French courts.[46] With respect to Germany, it is has been counted how often the BGH has cited the Austrian and Swiss Supreme Courts,[47] as well as the highest English, American and French courts.[48]

[45] Search for 'US SC' or 'US Ct of Apps' or 'Can SC' or 'Can Fed CA' or 'BC CA' or 'BC SC' or 'Ont HC' or 'Ont SC' or 'Aust HC' or 'Aust CA' or 'NSW CA' or 'NSW HC' or 'NSW SC' or 'Vic CA' or 'Vic SC' or 'NZ HC' or 'NZ CA' or 'NZ SC' or 'SA HC' or 'SA SC' or 'SA Const Ct' or 'Ir HC' or 'Ir SC'.

[46] Search for 'Cour de Cassation' or 'Cour d'Appel' or 'French Court of Appeal' or 'French Appeal Court' or 'French Supreme Court' or BGH or BVerfG or Bundesgerichtshof or Bundesverfassungsgericht or 'German constitutional court'.

[47] Search for 'österr. OGH', 'öst. OGH', 'öster. OGH', 'österreichische OGH', 'österreichische Oberste Gerichtshof', 'öst. Oberste Gerichtshof', 'OGH and österreich*', 'Schweizer Bundesgericht', 'schweizerisches Bundesgericht', 'Schweiz. Bundesgericht', 'Schweizer BG', 'schweizerisches BG', 'Schweiz. BG', 'BG and Schweiz*', or 'Bundesgericht and Schweiz*'. This complex search list was necessary in order to exclude citations to German courts.

[48] Search for 'Supreme court', 'House of Lords', 'Court of Appeal', 'Cour de Cassation', or 'Kassationsgerichtshof'.

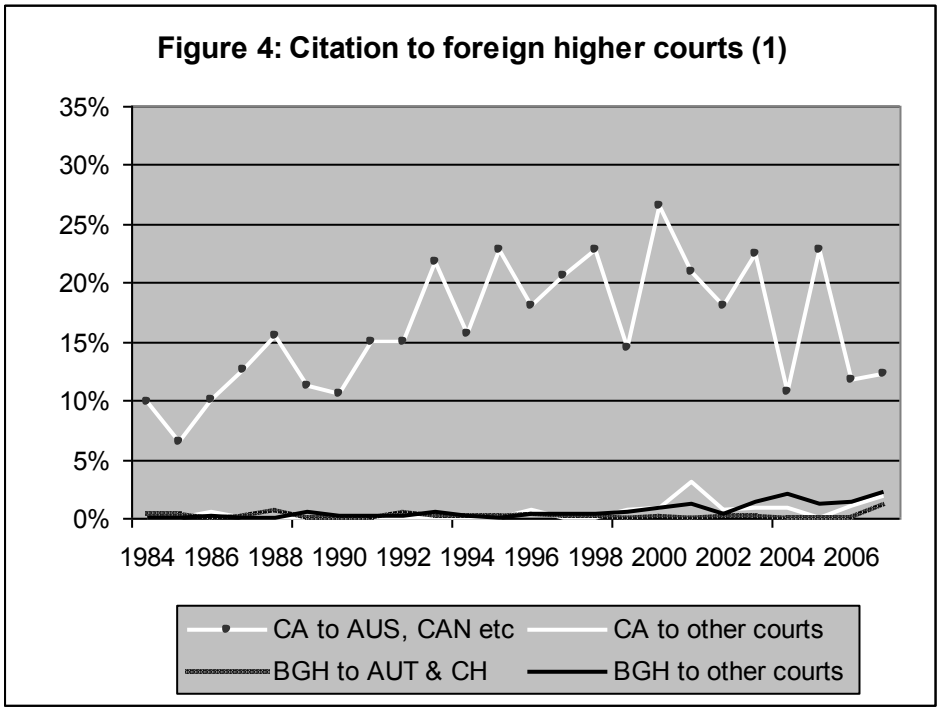

Figure 4 shows that the citations of the CA to English-language higher courts clearly outperform the other three categories. On average, about 16 per cent of the CA decisions cite the former courts,[49] whereas the other categories remain under 0.5 per cent.[50] The main reason is that all of these countries (except South Africa)[51] are Common Law countries. When the CA cites decisions from Common Law countries, this is not to be regarded as an 'import' of foreign law, but as a way to identify the common legal rules and principles (the 'Common Law is a whole'[52]). In the years 1984 to 2000 the percentage of citations rose from about 10 to 25 per cent, presumably, because the availability of databases made access to foreign cases easier. English judges have also

[49] To be precise, it is 16.12 per cent (standard deviation 5.38).

[50] On average 'other courts' have been cited in 0.47 per cent of the CA decisions (standard deviation 0.76), the highest Austrian and Swiss courts have been cited in 0.21 per cent of the BGH decisions (standard deviation 0.27) and 'other courts' have been cited in 0.24 per cent of the BGH decisions (standard deviation 0.21).

[51] Which is usually regarded as a mixed legal system. See *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Reinhard Zimmermann et al eds; Oxford; OUP, 2005).

[52] Örücü (n 42) 415.

endorsed the use of these foreign Common Law decisions as persuasive authority. For instance, according to Sir Robert Megarry the time was ripe to 'draw on the wisdom of those overseas, as they in the past have drawn on ours'[53]. Also, according to Lord Browne-Wilkinson 'it is manifestly desirable that the law on this subject should be the same in all common law jurisdictions'.[54]

In a recent decision, Laddie J indicated that this may be going too far because 'the common law system … stands the risk of being swamped by a torrent of material, not just from this country but from other jurisdictions, particularly common law ones'.[55] A similar concern is expressed in the Practice Direction on the Citation of Authorities.[56] However, the more recent trend does not confirm this alarmism. Since 2000 there has been an unstable development, with just over 10 per cent citations to foreign English-language higher courts in the years 2004, 2006 and 2007. A likely reason is the growing importance of statutory law in Common Law countries. This development weakens the common case-based origins of the law. Instead it can be shown empirically that the statutory law of English-speaking countries is very similar, compared to other parts of the world.[57]

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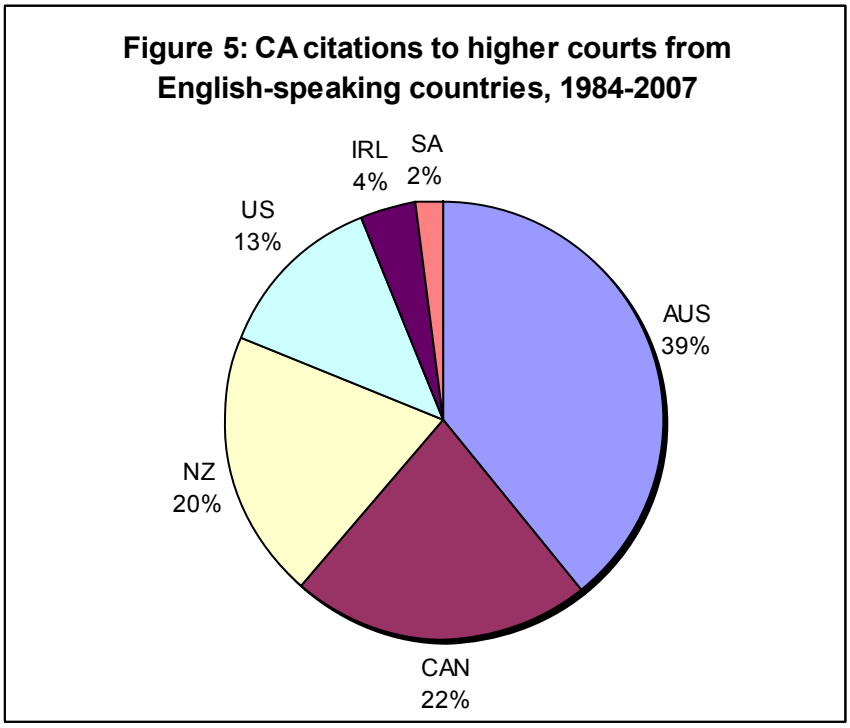
[53] *Conway v Rimmer* [1967] 1 WLR 1031, 1037 per Sir Robert Megarry.

[54] *Cheah v Equiticorp Finance Group Ltd* [1991] 4 All ER 989, 991 (PC) per Lord Browne-Wilkinson.

[55] Laddie J (n 29) para 79.

[56] Practice Direction (n 28) para 9.1 ('Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law').

[57] See Mathias M Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' (2007) 52 *McGill Law Journal* 55.

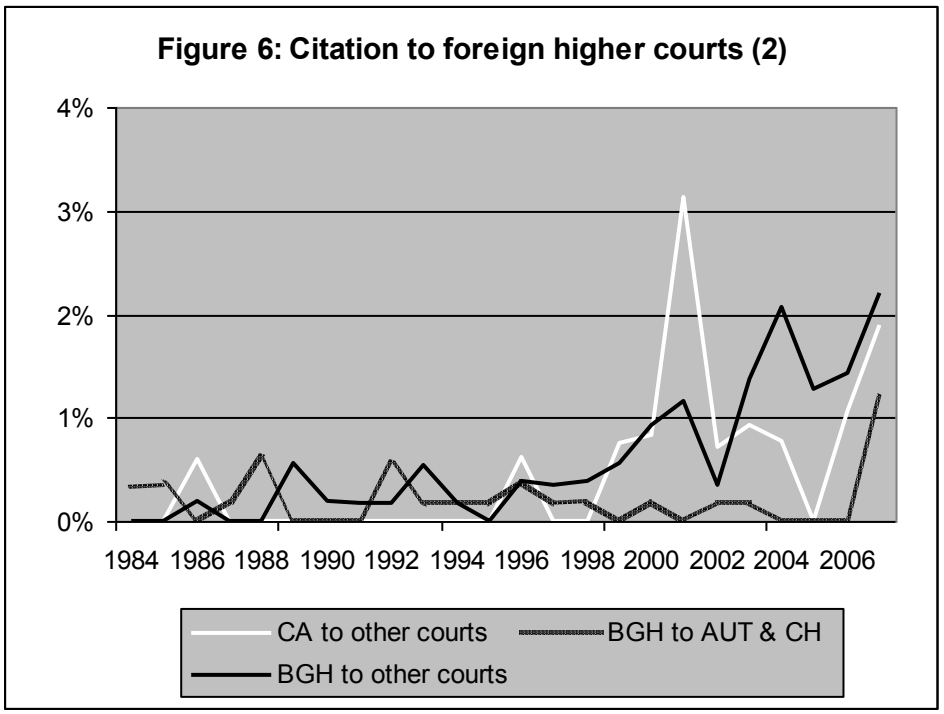


The weakening of the common case law is also confirmed by Figure 5. This figure presents how the citations to English-speaking countries split up: decisions from Australia, Canada and New Zealand are most often cited, whereas the most populated English-speaking country, the US, only follows on the fourth place. This should not be a surprise because 'in many respects US law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law'.[58] In particular, it is the case that in the US there is an amount of statutory law, which has 'assumed civilian proportions'[59] or which may even exceed the level of

[58] H Patrick Glenn, *Legal Traditions of the World* (Oxford, OUP, 2d ed., 2004) 248. See also M H Hoeflich, 'Transatlantic Friendships and the German Influence on American Law in the First Half of the Nineteenth Century' (1987) 35 *American Journal of Comparative Law* 604; S Riesenfeld, 'The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples' (1989) 37 *American Journal of Comparative Law* 1.

[59] Glenn (n 58) 249.

legislation of Civil Law countries.[60] Furthermore, reference can be made to the unique federal structure of the US, and the fact that the Judicial Committee of the Privy Council has never decided cases from the US.[61]



With respect to the other three categories, Figure 6 uses a different scale in order to identify how the citations to foreign higher courts have developed. Since 2000 the number of citations has slightly increased,[62] but since there have only been very few hits, one should not over-interpret this observation.[63] Comparing the three categories, it is

[60] For instance, in securities and financial regulation, where the codified US law has been a model for the rest of the world. See Mathias M Siems, Con*vergence in Shareholder Law* (Cambridge: CUP, 2008) 126-127.

[61] Whereas the Privy Council decided Canadian cases until 1959, Australian cases until 1986 and New Zealand cases until 2004.

[62] For citations of UK courts to continental European decisions see also Sir Basil Markesinis and Jörg Fedtke, 'The Judge as Comparatist', (2005) 80 *Tulane Law Review* 11, 31-2; Örücü (n 42) 423.

[63] For instance, even the peak in citations of the CA to other countries in 2001 is just the result of three decisions: *Bellinger v Bellinger* [2002] 1 All ER 311; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC and others* [2001] 3 All ER 257; *Nasser v United Bank of Kuwait* [2002] 1 All ER 401.

interesting that the number of BGH citations to the highest Austrian and Swiss courts is less than the values of the two other categories.[64] Thus the (allegedly) common German legal origin[65] is apparently only a weak link, not comparable with the common origins of Common Law countries.

The main result is that, apart from within Common Law citations, the BGH and the CA rarely make references to foreign courts. This negative finding is in line with most of the previous studies.[66] The reluctance of courts to cite foreign case law is also hardly surprising.[67] Judges often lack the knowledge and the time to take foreign decisions into account. Moreover, there may be reasons based on national sovereignty, which was recently vividly emphasised by some of the judges of the American Supreme Court. For instance, it has been said that 'this Court ... should not impose foreign moods, fads, or fashions on Americans,'[68] and that 'in foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever'.[69] These may be considered extreme statements. How-

[64] See the data at n 50 above.

[65] See the references in Siems n 57 above.

[66] Sir Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law* (2006); Duncan Fairgrieve, Mads Andenas and Guy Canivet (eds), Comparative Law Before the Courts (London BIICL 2004); Ulrich Drobnig and Sjef Van Erp (eds), *The Use of Comparative Law by Courts* (London: Kluwer, 1999); Kötz (n 43); Markesinis and Fedtke (n 62).

[67] See already Mathias M Siems, 'The End of Comparative Law', (2007) 2 *The Journal of Comparative Law* 133.

[68] *Lawrence v Texas* 123 Ct 2472, 2495 (2003) (Scalia J) and *Foster v Florida*, 537 US 990 (2002) (Thomas J); similar *Atkins v Virginia* 536 US 304, 348 (2002) (Scalia J). See also Pierre Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) 1 *The Journal of Comparative Law* 365. More generally, see also David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis', (2006) 3 *Journal of Empirical Legal Studies* 297.

[69] Statement by the current Chief Justice Roberts during his confirmation hearings, September 2005, available at http://transcripts.cnn.com/TRANSCRIPTS/0509/13/se.04.html (last visited 6 December 2008). See also *Roper v Simmons* 543 US 551, 608 (2005) per Justices Scalia, Thomson, and Rehnquist ('to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making').

ever, in Europe also, there are voices which indicate that due to reasons of national sovereignty[70] or because of the complexity of comparative research,[71] judges may be hesitant in picking and choosing single decisions from specific foreign jurisdictions.

CITATIONS OF OWN DECISIONS

The following addresses how often and when BGH and CA cite their own decisions. Four volumes were chosen for each of the courts. With respect to the BGH it was examined how frequently the decisions of the volumes 10 (1953), 50 (1968), 100 (1987), and 140 (1998) of the official law reports (BGHZ) have been cited (Figure 7). And with respect to the CA it was traced how often the CA decisions published in volumes (1953) 1, (1968) 1, (1987) 1, (1998) 1 of the Weekly Law Reports (WLR) have been cited (Figure 8).[72]

[70] Christian von Bar, 'Comparative Law of Obligations: Methodology and Epistemology' in Van Hoecke, M (ed) *Epistemology and Methodology of Comparative Law* (Oxford: Hart 2004) 123, 124-5.

[71] See Sir Basil Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford: Hart 2003) 39, 61-2.

[72] For the reasons explained under text to notes 11-12 this methodology differs from the other parts of this article.

Figure 7: BGH citations of own decisions

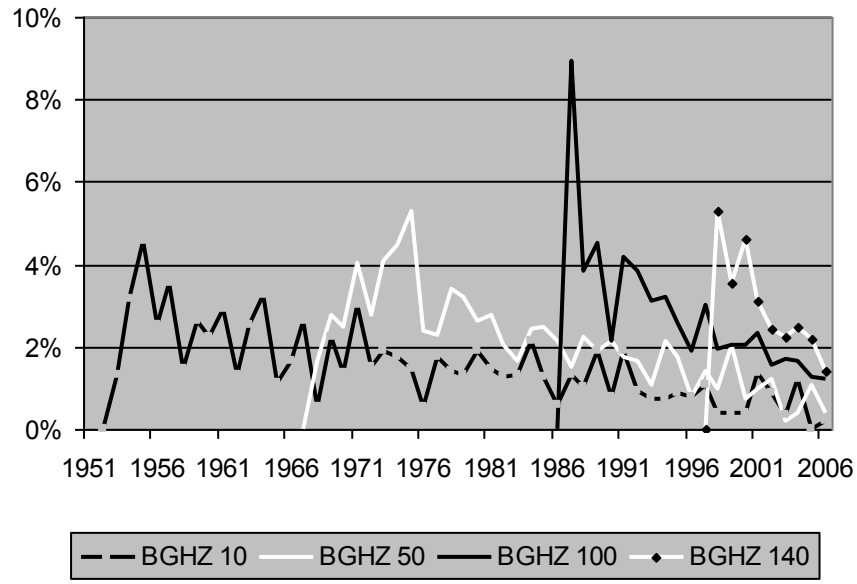
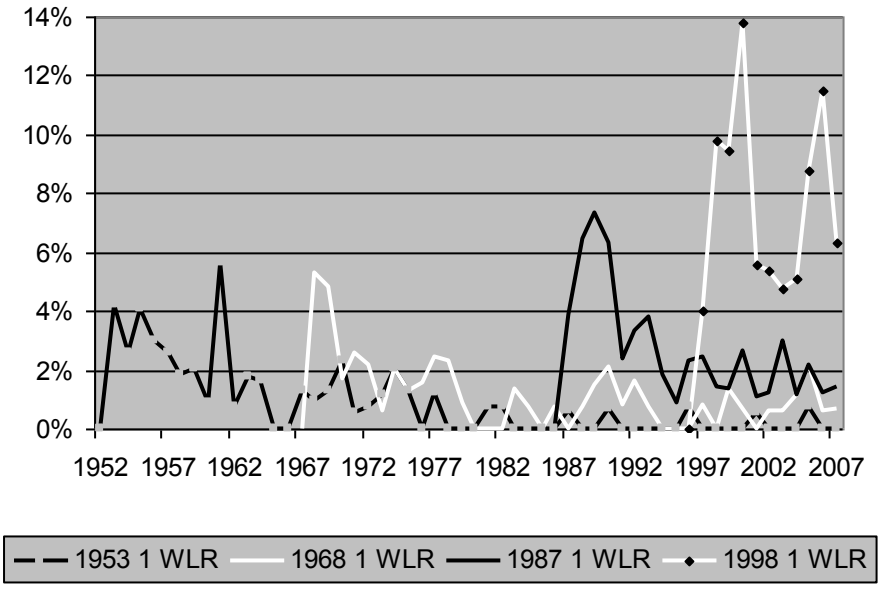


Figure 8: CA citations of important own decisions



The general shape of the above curves is that there are initially no citations, then a steep rise, and finally a smooth decline. Three reasons can be brought forward in order to explain these developments. First, it is likely that initially there is an 'excitement' about new decisions, but subsequent decisions or law reforms may modify or even re-

verse their findings. Secondly, courts may prefer to cite the most recent decision. Thus, in these situations the original decision is still 'good law', but 'falls victim' of a short-hand citation. Thirdly, court decisions reflect the socio-economic problems at that time. As the world constantly changes, some of the topics of older decisions become obsolete.

The eight curves of Figures 7 and 8 do not look entirely identical. Some of the curves reach a considerably higher peak, and some are less skewed than others. In order to identify the reasons for these different shapes, one would have to examine the specific citations of the specific years in a non-quantitative way (which is not the topic of this article). Comparing the BGH and CA data, it can, however, be established mathematically that the 'skewness'[73] of the German and UK curves is similar.[74] This may not have been expected. It could have been the case that for a system of case law old decisions are more honoured than in the Civil Law world. This may indeed be true for some old and famous cases. However, Figure 8 shows that by and large there is also a preference for more recent citations in the decisions of the CA. This is confirmed by the Practice Direction on the Citation of Authorities, which recommends that usually only one authority should be cited in support of a given proposition.[75] Most often, this will be the most recent decision.

[73] Skewness means 'the degree of asymmetry of a distribution around its mean. Positive skewness indicates a distribution with an asymmetric tail extending toward more positive values. Negative skewness indicates a distribution with an asymmetric tail extending toward more negative values'; see http://office.microsoft.com/en-gb/excel/HP052092611033.aspx (last visited 16 September 2009).

[74] For the BGH the numbers are between 0.74 and 2.45 and for the CA between 0.71 and 1.89.

[75] Practice Direction (n 28) para 8.1.

THE SPECIAL CASE OF THE UK

The Court of Appeal of England and Wales (CA) has no jurisdiction over Scottish and Northern Irish cases. Still, since England, Wales, Scotland and Northern Ireland are part of the United Kingdom, it may be expected that the CA takes into account the decisions of the highest Scottish courts[76] and the Court of Appeal in Northern Ireland.[77]

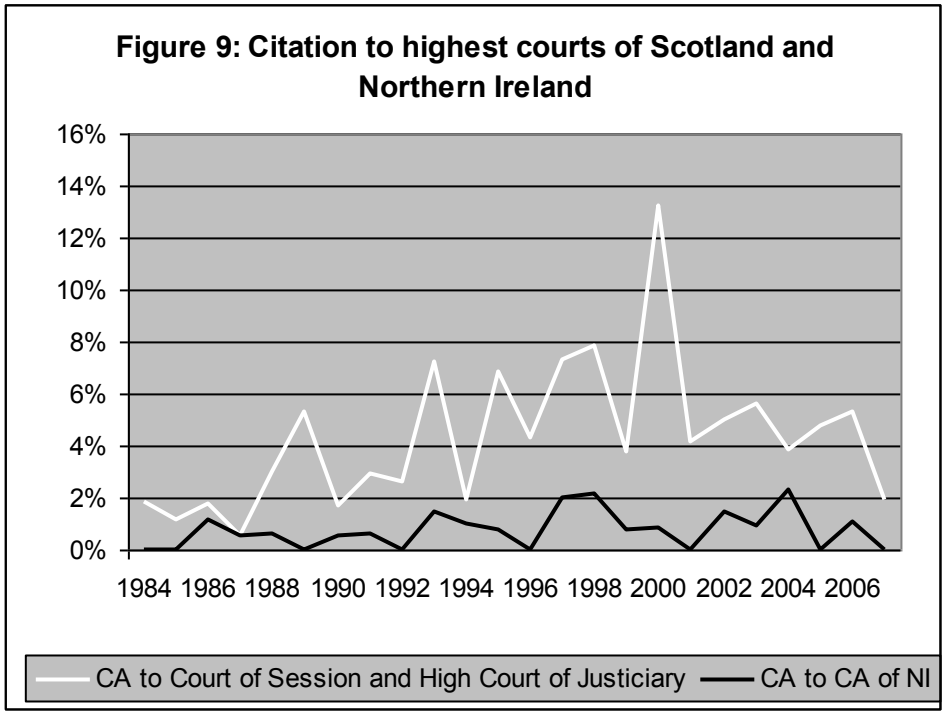


Figure 9 shows that decisions of the Court of Appeal in Northern Ireland have hardly been cited by the CA.[78] Scottish decisions have been mentioned more frequently; however, there has been a lot of variation.[79] Focussing on the last seven years, it is in-

[76] Namely the Court of Session for Scottish civil cases and the High Court of Justiciary for Scottish criminal cases.

[77] Search for 'Ct of Sess' or 'HC of Just' and 'NI CA'. Again, it was only possible to search for the period between 1984 and 2007 (see n 44).

[78] On average the Court of Appeal in Northern Ireland has been cited in 0.75 per cent of the CA decisions (standard deviation 0.72).

[79] On average the Court of Session or the High Court of Justiciary have been cited in 4.32 per cent of the CA decisions (standard deviation 2.81).

teresting that in contrast to the 1990s, there has not been any year in which more than 6 per cent of the CA decisions have cited the highest Scottish courts. This could be a by-product of the Scottish devolution,[80] leading to a gradual divergence of English and Scottish law. Furthermore, it is interesting to observe that the peak in 2000 partly results from the fact that the Human Right Acts 1998 came into force in Scotland one and a half years earlier than in England, thus being a testing ground for the Act.[81]

It can also be examined more generally, how often the highest courts of the UK cite each other. Figures 10 and 11 present the absolute and percentage figures for cross-citations between the House of Lords (HL),[82] the Court of Appeal of England and Wales (CA), the Court of Session and the High Court of Justiciary (CS, HJ) and the Court of Appeal in Northern Ireland (CA NI) in 2007.[83]

[80] Scotland Act 1998 (1998 c 46).

[81] To be precise, five out of 16 decisions of the '2000 peak' refer to the Human Rights Act.

[82] These figures include citations from and to the Privy Council. See text to notes 9-11 above.

[83] The following databases of Lexis Nexis have been used: All ER for House of Lords and Court of Appeal of England and Wales; Scottish Civil Law Reports and Scottish Criminal Law Reports for the Court of Session and the High Court of Justiciary; Northern Ireland Law Reports for the Court of Appeal in Northern Ireland.

Figure 10: Cross-citations 2007 (absolute numbers)

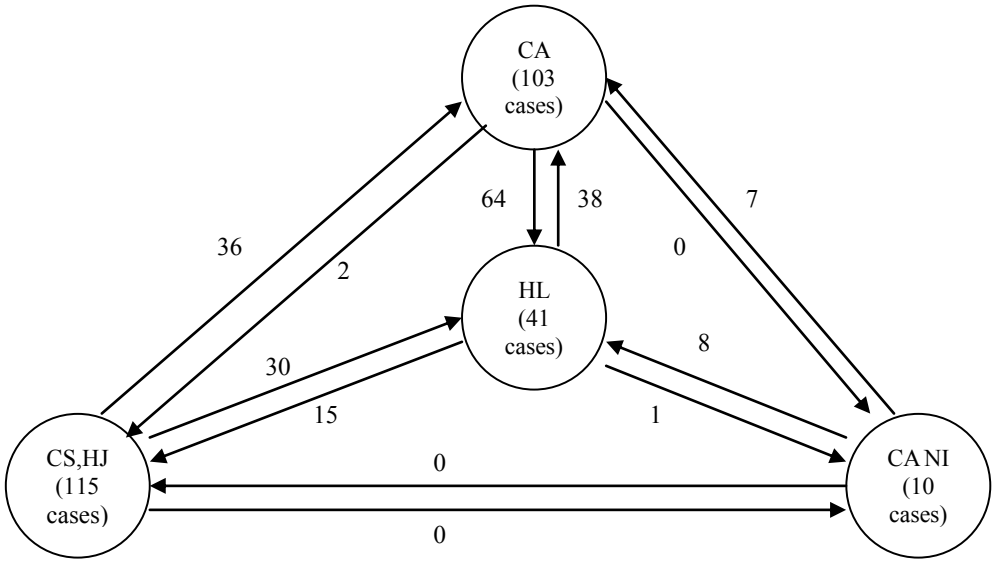
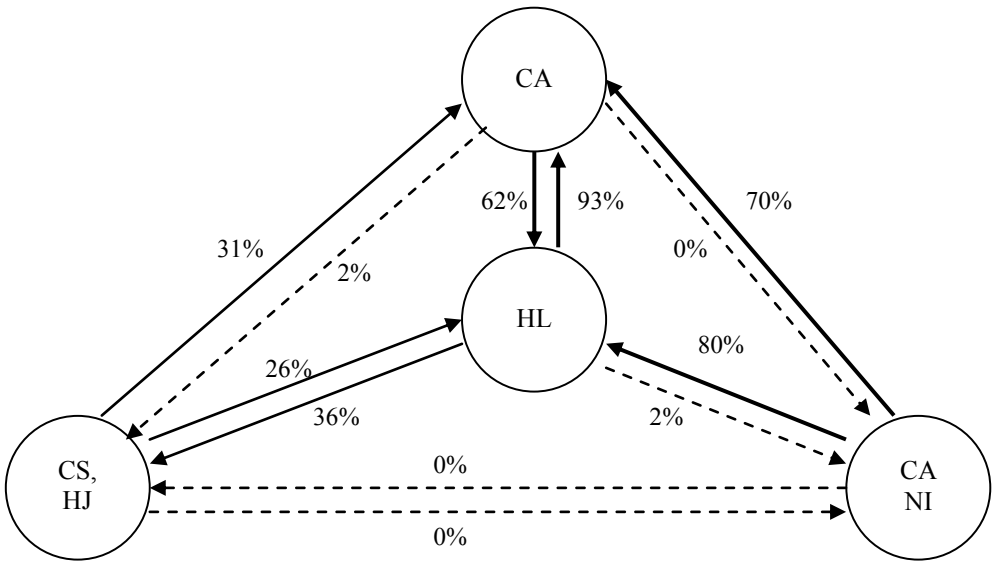


Figure 11: Cross-citations 2007 (percentage figures)



One would expect that there is an imbalance between the courts of the larger and smaller jurisdictions. Such a relationship can indeed be identified between the Court of Appeal in Northern Ireland and the CA and HL. The Court of Appeal in Northern Ire-

land frequently refers to the two latter courts, but not vice versa. This is different for the highest Scottish courts. These courts occasionally refer to decisions of the CA and HL but, given the special nature of the Scottish legal system, this is less frequent than in the relationship between CA NI and CA/HL or CA and HL. It may also be somehow surprising that the House of Lords (but not the Court of Appeal), has cited the higher Scottish courts in more than one third of all cases. Partly, this is the result of appeals to the House of Lords which concern Scottish cases.[84] Moreover, it plays a role that two of the Law Lords are trained Scottish lawyers.[85]

CONCLUSION

This article has used quantitative data in order to compare the citation patterns of the Court of Appeal of England and Wales (CA) and the German Federal Supreme Court (BGH). In a number of instances, similarities between the two courts could be identified. For instance, citations to their highest national courts, the European Court of Human Rights and the European Court of Justice have become more frequent. It has also been found that there is a similarity in the way how the BGH and CA cite their own decisions.

Using a sample of all citations it could not be confirmed that in England there is a natural tendency to cite more case law than in Germany. More specifically, it was, however, found that the European courts are cited more often by the CA than by the BGH. Moreover, the BGH hardly ever cites foreign courts, not even from the other German-

[84] Of the 41 decisions 33 are appeals from England and Wales, 4 from Scotland, 2 from Northern Ireland and 2 are Privy Council cases.

[85] Lord Hope of Craighead and Lord Rodger of Earlsferry. See http://www.parliament.uk/about_lords/the_law_lords.cfm (last visited 16 September 2009).

speaking countries, whereas the CA frequently refers to courts from the English-speaking world. Thus, at least in the adjudication, the bond between countries of the English legal family is stronger than the German one.

The number of BGH citations to other courts has either been stable or, with respect to the German Federal Constitutional court and the European courts, constantly increasing. Conversely, the development of the CA citations has been more volatile. In general, most citations have been increasing. However, in the last five to ten years there has often been a decline in citations. In some cases there are specific reasons for this development, for instance, with respect to citations to the highest Scottish courts the Scottish devolution. Furthermore, the growing amount of statutory law may have an impact on the citation practice of the CA. In particular, we can observe a gradual weakening of the common case-based origins of Common Law countries.